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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 734

ALBERT HERMAN LANDEROS,

Petitioner,

against

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

J. MERCER BURRELL,
Attorney for Petitioner,
23 Howard Street,
Newark, New Jersey.

MORTON STAVIS,
Of Counsel,
744 Broad Street,
Newark 2, New Jersey.

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IN THE

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No.

ALBERT HERMAN LANDEROS,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the final judgment of the Supreme Court of the State of New Jersey which affirmed, by a vote of four to three, a judgment of the Union County Court, Law Division, convicting petitioner of rape.

The Opinion Below

The opinion of the Supreme Court of New Jersey affirming the conviction below is reported at 20 N. J. 76 (Sup. Ct.

1955), and is reprinted in the appendix to this petition, *infra* (App. *Infra* 20).*

Statement of Grounds of Jurisdiction

1. The judgment of the Supreme Court of New Jersey was rendered on November 21, 1955.

2. Application for rehearing was timely made and was denied on December 19, 1955 (App. *Infra* 33), making the court's judgment final as of that date.

3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. §1257(3).

Questions Presented for Review

1. Was not the petitioner denied due process of law under the Fourteenth Amendment of the Federal Constitution by a conviction based upon testimony known by the law-enforcement arm of the State to have been false and under circumstances where decisive evidence favorable to the petitioner was knowingly suppressed by law-enforcement officers?

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* References in this Petition are to three separate appendices:

(1) The printed appendix before the Supreme Court of New Jersey herein referred to as Print. App. While such printed appendix states that it is before the Superior Court of New Jersey, Appellate Division, it was, in fact, submitted to the Supreme Court of New Jersey because the Supreme Court certified the appeal to itself on its own motion.

(2) The mimeographed supplemental appendix before the Supreme Court of New Jersey, herein referred to as Mimeo. App.

(3) The appendix attached to this petition herein referred to as App. *Infra*.

2. May a state court, under the circumstances related in the preceding question, deny the petitioner an opportunity to bring before a new jury favorable evidence which had been deliberately suppressed by the prosecution and which would have materially affected the factual situation as presented to the jury which convicted the petitioner?

Statutes and Regulations Involved

None.

Statement of the Case

Petitioner was charged with the rape of Lois Ann Stiles, on January 30, 1953, in Westfield, Union County, N. J., in violation of N. J. S. 2A:138-1 (Print. App. 1a). The issue at the trial was solely that of identification. The petitioner denied any involvement with Miss Stiles and proved an alibi.

The case is most unusual because, by a fortunate circumstance, the Supreme Court of New Jersey on its own motion brought before it, in connection with its consideration of this case, confidential police reports which disclosed deliberate suppression by the prosecution of evidence decisively favorable to the petitioner.

The facts as they thus developed before the Supreme Court of New Jersey were actually quite different from those that were presented to the jury. It is the failure by the Supreme Court to permit a retrial so that these important suppressed facts may come for the first time before a jury that constitutes the issue upon this petition. The Court will observe that even though the suppressed facts came before the Supreme Court of New Jersey on its own motion, and passing reference is, in fact, made in the court's opinion to the existence of such facts (App. *Infra* 28), the

court's opinion nevertheless upholds the conviction purely upon the basis of the incomplete and false testimony given to the jury.

Indeed, the court's opinion gives no inkling of what the suppressed facts are, or even that there were *suppressed* facts. It decided the case ignoring the constitutional implications of such factual suppression, notwithstanding that the federal constitutional question was squarely raised before it.

1. The facts as they were presented to the jury.

The complaining witness, Miss Stiles, was a white girl who at the time of the attack was 19 years of age. At approximately 10:15 P.M., on the evening of January 30, 1953, she, unaccompanied, left a soda parlor and walked down a main street of Westfield, N. J., in the direction of her home (Print. App. 7a-24). She observed a man approaching her (Print. App. 8a-4 *et seq.*). She could not discern the features of the man as he came abreast of her and passed her (Print. App. 13a-8). The man walked past her, but then seized her from behind and pulled her some hundred feet into an adjacent empty lot (Print. App. 8a-30). There she was robbed and raped (Print. App. 9a-5 *et seq.*), her assailant keeping her face covered most of the time with her own jacket (Print. App. 9a-10, 23 to 29).

Miss Stiles emphasized at the trial that she was able to see her assailant only momentarily but noticed that he had a mustache (Print. App. 9a-30) and a distinctive double-banded ring (Print. App. 9a-28). She stressed that she was basing her identification of petitioner to a large extent on these two crucial elements of identification (Print. App. 11a-39 to 40, 17a-13).

Four days after the rape, on February 3, 1953, for reasons which were never explained at the time of the trial, Miss Stiles was taken to Belle Mead, an army depot in

New Jersey, where the petitioner, a Negro, was employed as a welder (Print. App. 11a-19, 25a-16 *et seq.*; 50a-18 *et seq.*). After a most thorough examination of him, including careful observation of his appearance (Print. App. 27a-27, 28a-6), voice (Print. App. 27a-38), apparel (Print. App. 109a-18), and physical characteristics and walk (Print. App. 109a-25), even feeling his hands and closely examining his wedding ring (Print. App. 29a-32, 30a-26, 109a-16, 174a-3), she failed to identify him as her assailant to the police (Print. App. 35a-40, 36a-1 *et seq.*).

Inexplicably, however, she contended, nevertheless, that while she was at Belle Mead she had recognized him as her attacker (Print. App. 47a-12 to 29). She was permitted to testify—entirely without contradiction from the police—that she had recognized his voice "right away" as that of her assailant (Print. App. 27a-38, 31a-7), and, further, that she had disclosed her recognition of his voice to either the Chief of Police of Westfield or the Police Lieutenant (Print. App. 31a-10). She also claimed that she had seen the assailant's distinctive ring on petitioner's hand at Belle Mead (Print. App. 30a-26, 174a-3), although she admittedly failed to disclose an identifying object of such self-evident importance to the Westfield police (Print. App. 30a-39).

Miss Stiles later stated that though she had not identified the petitioner to the police at Belle Mead she had identified him to "somebody else" on the trip home from Belle Mead (Print. App. 35a-18, 45a-22). She conceded, however, that she had spent the six weeks following the visit to Belle Mead examining numerous photographs shown to her by the police and making personal examinations of numerous other suspects (Print. App. 36a-15 *et seq.*, 37a-1 *et seq.*).

On March 9, 1953, six weeks after the rape, Miss Stiles was taken by the police to confront the petitioner again,

this time at the police station in Rahway, N. J. (Print. App. 11a-28, 38a-9, 29). He had been arrested in Rahway the day before on a charge of simple assault and battery (no sex offense was ever charged in this incident) (Mimeo. App. 28a) made by Miss Mary Ferranti (whom he described as a "hustler" who had provoked him by insulting him and his race after he had declined her solicitations) (Mimeo. App. 33a).

Notwithstanding Miss Stiles' absolute failure to identify the petitioner at Belle Mead or at any other time during those six weeks (Print. App. 35a-40, 36a-1 *et seq.*), she testified that she instantly identified him at Rahway as her assailant (Print. App. 40a-29 to 31). The prosecution disclosed nothing to the jury as to what had transpired between the complaining witness and the police immediately prior to this sudden change in Miss Stiles' ability to recognize the petitioner as her assailant.

Petitioner took the stand and denied the crime. At the time of the crime, he had been working in Scotch Plains, N. J., an entirely different town, welding cars (Print. App. 99a-40, 103a-5, 105a-9). Three disinterested witnesses supported this alibi, each recalling his presence in a garage with them that particular night for different personal reasons (John Rogerson, Print. App. 63a-20, 70a-3; racing driver Michael Fiore, Print. App. 82a-12, 84a-11, 84a-30); Louis Yannota (Print. App. 73a-15, 75a-24).

The case thus went to the jury as one where the testimony of the complaining witness albeit weak (the Supreme Court of New Jersey characterized it as "vacillating and uncertain" (App. *Infra* 23)) appeared to have the full support of the police and prosecution. There was however no corroboration of Miss Stiles' identification.

It was manifest, nevertheless, that the jury was deeply troubled by the key question which must haunt anyone who

considers the record of this case as made before the jury: How could Lois Stiles six weeks after the rape positively identify the petitioner as her assailant when only four days after the crime she failed to identify the petitioner as her assailant? The record shows that the jury specifically asked for "a partial review of the testimony concerning Lois Ann Stiles' statement as to her recognition of the defendant as her attacker at Belle Mead on February 3, 1953" (Print. App. 189a-29), a request which the trial court denied (Print. App. 189a-32). After seven hours of deliberation, the jury returned a verdict of guilty (Print. App. 189a-25, 191a-28 to 36).

Petitioner was sentenced to prison for 10 to 12 years (Print. App. 198a-32).

2. The facts as they unfolded before the Supreme Court of New Jersey.

As this case progressed on appeal, a startling story was uncovered which made the case wholly different from what it theretofore had been when tried before the jury.

The Supreme Court of New Jersey certified the appeal of petitioner's conviction directly to itself (App. *Infra* 21).

Oral argument before the Supreme Court of New Jersey commenced on October 10, 1955, but was not completed on such date, and was accordingly continued to the following week. During the first day of oral argument, petitioner's counsel repeated a challenge that had been made in the written brief that it was obvious that both the police and the prosecution knew much more than had been disclosed to the jury as to how Miss Stiles had come to reverse herself so squarely with respect to the identification of the petitioner.

As a result of numerous questions put on the first day of oral argument by members of the court to counsel for both the defense and the prosecution, the court in an un-

usual procedure, inquired whether counsel for both sides would consent to have the court consider the police records of all the towns which had evinced an interest in the petitioner *i.e.*, the towns of Westfield, Plainfield, Cranford, and Rahway, all of New Jersey, and, in addition, the presentence probation and psychiatric report (App. *Infra* 28). It was understood, of course, that counsel for the defense could then likewise examine these documents. Both sides consented, and counsel for the defense, for the first time, saw the hitherto secret police reports relating to the petitioner.

Oral argument on the appeal resumed on October 17, 1955. At this point, counsel for the defense presented to the Supreme Court of New Jersey a mimeographed Supplemental Memorandum and Supplemental Appendix (now before this Court) dealing with the entirely new facts which had been disclosed by the secret police reports, and squarely raising the constitutional question of the impropriety of a conviction where the prosecution deliberately suppressed evidence favorable to the defendant. *Pyle* v. *Kansas*, 317 U. S. 213 (1942) was cited to the court.

The facts as they unfolded through these documents from the police files now proved to be widely different from what they had been represented to be at the trial before the jury. Two separate sets of new facts were disclosed.

The first of these showed that Miss Stiles' original description of her assailant was entirely contrary to the actual appearance of the petitioner; in fact, it was perfectly obvious that she was describing someone other than him. They showed further that at the trial she had altered her description of the assailant to conform to what she knew was the petitioner's appearance; that far from making an equivocal identification of the petitioner at Belle Mead, as the jury was led to believe by her testimony and the tacit approval of her testimony by the police and prosecution,

she had instead there categorically stated to the accompanying police officers that he was *not* her assailant; and that she had changed her story so as to identify the petitioner at Rahway only after the Westfield police had told her that the petitioner had "attacked a white girl in Rahway" (Mimeo. App. 6a), the police thereby implying that the petitioner had been charged with a sex offense in Rahway (see Report of Police Lieutenant Hann of Westfield, Mimeo. App. 8a)—a statement by the Westfield police which was false (see complaint by Miss Mary Ferranti charging simple assault and battery, Mimeo. App. 28a).

The second set of facts—showing a widespread pattern by the police of false dubbing of this petitioner as a rapist and of their pinning various unsolved sex offenses in the area on him—provided the explanation for the suppression of facts favorable to the petitioner. The details of what was disclosed by the police files follow:

(a) The record as to what had actually happened at Belle Mead was no longer in the confused state presented to the jury, where Miss Stiles swore that she recognized the petitioner at Belle Mead, had there told the police that she had recognized his voice as being that of her assailant (Print. App. 27a-38, 31a-7) and had also recognized his distinctive ring (Print. App. 30a-26, 174a-3)—but nevertheless somehow or other did not identify the petitioner as her assailant to the police. Instead, these newly discovered records showed that Lieutenant Hann of the Westfield police had written a report after the Belle Mead visit, in which he said:

> "Lois listened to this man talk and looked him over very carefully and said that this man was not the one that raped her on January 30th, 1953." (Mimeo. App. 5a).

An amazing fact in this connection is that the prosecution put Lieutenant Hann on the witness stand at the trial, but

that neither he nor the prosecution made the slightest mention of this report favorable to the petitioner (Print. App. 49a-26 *et seq.*).

(b) It was now conclusively proved that Miss Stiles had made a false statement at the trial when she testified that she had identified the petitioner as her assailant to "somebody else" than the police (Print. App. 35a-19). The police records disclosed that the "somebody else" was a Miss Edna McLaughlin of Cranford, N. J., who had been raped by an unidentified person in Cranford on November 1, 1952 (Mimeo. App. 18a) and who was brought to Belle Mead together with Miss Stiles for possible identification of the petitioner (Mimeo. App. 8a). Like Miss Stiles, Miss McLaughlin utterly failed to identify the petitioner at Belle Mead as her assailant (Report of Lieutenant Hann, Feb. 25, 1953, Mimeo. App. 5a). Two reports by the Cranford police show moreover that Miss Stiles, directly contrary to her testimony at the trial, had actually told Miss McLaughlin at Belle Mead that her assailant was "a darker man" than petitioner (Report of Lieutenant Rosendale of Cranford, Mimeo. App. 22a). In fact:

> "After viewing him at Belle Mead on Feb. 5, she [Miss McLaughlin] was hesitant about saying due to Miss Stiles' saying she thought the person who had attacked her was of a darker color." Report by Lieutenant Rosendale of Cranford (Mimeo. App. 23a).

(c) The confidential police reports showed conclusively that Miss Stiles' assailant did not resemble the petitioner in the slightest.

Petitioner is a "tall, lanky individual" (Probation Report, Mimeo. App. 31a), 5 feet 11 inches in height and only 155 pounds in weight (Probation Report, Mimeo. App. 29a). His most striking facial characteristic at the time of the crime was a most unusual long black, drooped mustache re-

sembling a Genghis Khan type of mustache (see photographs of petitioner taken March 11, 1953, App. *Infra* 35). As such photographs clearly show, he has long, acquiline features, and thin lips. His complexion is light. He was born and reared in this country and has no accent.

The police reports brought before the Supreme Court disclosed the following original description of the assailant given by Miss Stiles to the police on January 31, 1953:

> "He was about 5-8 in highth, [sic] stocky built, square face, large lips, large hands, wore a light colored 'Be Bop' cap, form fitting jacket which ended at the waist line (dark color) light colored pants, which looked like they had ashes spilled on the front. I also noticed that he had a ring on one of his fingers which appeared to be gold and seemed to me to be a double band. I also recall that he addressed me as Seniorieta."
>
> * * *
>
> "Q. Do you think that you would be able to identify this man if you saw him again? A. I would recognize his voice I know and if he was dressed the same I would know him.
>
> * * *
>
> "Q. Did he speak good English or did he have an accent. A. He had an accent." (Statement of Lois Stiles, dated January 31, 1953, Mimeo. App. 3a.)

This original description of the assailant, fairly bristles with differences from the description Miss Stiles gave the jury of her assailant:

The very unusual long, drooping mustache of petitioner was not mentioned at all in this description of January 31, 1953, nor for that matter is any mustache there mentioned; and, in fact, there is no mention of any mustache in any of Miss Stiles' descriptions of the assailant until she was taken to Rahway almost seven weeks after the

rape (Mimeo. App. 6a). Her assailant, she told the police, was of "stocky build"; the petitioner, a tall, lanky man, 5 feet 11 inches in height and weighing only 155 pounds, is anything but stocky. Her assailant had "large lips"; a glance at the photographs of the petitioner shows anything but "large lips" (App. *Infra* 35). Her assailant had a "square face"; again a glance at the photographs shows that this is most certainly not the petitioner. Her assailant spoke with an accent; the petitioner is a native-born American who speaks English entirely without accent.

The vast differences between the assailant as originally described by Miss Stiles and the actual physical appearance of the petitioner were never disclosed to the jury.

(d) The secret police files finally provide the answer to the puzzling question of how Miss Stiles could possibly identify the petitioner at Rahway as her assailant when she had denied at Belle Mead about six weeks previously that he was the assailant. They show conclusively that she was specifically induced to identify him at Rahway, and thus to reverse herself squarely on the identification, by a false police story told to her following petitioner's Rahway arrest that he had attempted to "attack a white girl".

Thus, Miss Stiles' own statement, taken by Westfield Police Chief Albert Pfirrmann, on March 9, 1953 (Mimeo. App. p. 6a) states:

> "At about 1:30 p.m., March 9, 1953, Chief Pfirrmann and Detective Duelks of the Westfield Police Department came to the place where I am employed and informed me that the Rahway New Jersey Police had picked up a colored man who attempted to attack a white girl in Rahway last night and they asked me if I would be willing to go to Rahway to see if I could identify this man as the one who had attacked me in Westfield on January 30, 1953."

While Miss Stiles here used the term "attack" rather than "rape", there is no doubt that that word was used both by her and the Westfield police as being synonymous with "rape". Miss Stiles, it will be noted, used the same word "attacked" both for the Rahway incident and for her own rape in Westfield. And there is no doubt that the Westfield police referred to the Rahway incident as "attempting to rape a white girl". See Report of Lieutenant Hann and Detective Duelks dated March 11, 1953 (Mimeo. App. 8a). The truth was, as we have previously noted, that the petitioner's arrest in Rahway was for simple assault and battery (see Complaint of Miss Ferranti, Mimeo. App. 28a).

Thus, every crucial phase of the testimony of Miss Stiles at the trial was torpedoed by the true facts as they were developed by the newly discovered evidence brought into the case for the first time during the argument before the Supreme Court of New Jersey.

It was manifestly plain that these facts favorable to the petitioner and adverse to the testimony of Miss Stiles were fully known to the prosecution at all times. It is inconceivable that a jury would not have been affected most materially by these facts—particularly, when dealing, as the Supreme Court of New Jersey itself noted, with a witness whose "testimony as to the Belle Mead incident was vacillating and uncertain and undoubtedly affected her credibility in so far as her identification of the defendant was concerned" (App. *Infra* 23).

Other facts disclosed to the Supreme Court of New Jersey by these heretofore secret files provide the explanation why the prosecution suppressed these crucial facts. These police files revealed that the police had taken a citizen of no previous criminal record, happily married and the father of two children, honorably discharged from the United States Navy, a regular attendant at church, and

a hard-working Government employee who at the time of his arrest was simultaneously holding down three jobs (see Probation Report, Mimeo. App. 30a, 31a; Print. App. 99a-27 *et seq.*) and had determined that this citizen was to be the convenient solution for their unsolved sex crimes.

For the first time, it now became clear why the two women, Miss Stiles of Westfield and Miss McLaughlin of Cranford, had been taken to Belle Mead in an attempt to identify the petitioner. The secret files disclose that the police of an entirely different community, Plainfield, N. J., where the petitioner resided (Print. App. 90a-30) had falsely told the police of Westfield and of Cranford that the petitioner had been arrested in their town for "attempted rape" and that the visit to Belle Mead followed immediately thereafter (see Report of Westfield Detective Duelks dated April 2, 1953, Mimeo. App. 9a; Report of Cranford Police Lieutenant Rosendale dated Feb. 2, 1953, Mimeo. App. 19a). The records further show that there was absolutely no charge of any sex offense whatsoever leveled at any time against the petitioner in Plainfield, that on the contrary, after he had reported his car stolen, he was arrested on a charge of robbery and possessing a dangerous weapon (a linoleum knife he was bringing home from the place of purchase) and that these charges were dismissed as groundless by the municipal court of Plainfield with the full concurrence of the prosecutor of Union County, N. J. (Mimeo. App. 10a to 17a).

Notwithstanding the failure of the Belle Mead trip to produce the desired identification of the petitioner as a sex offender, the police in a neighboring community, Rahway, upon arresting him for simple assault and battery, likewise falsely dubbed him a rapist. In fact, a teletype was sent out by the Rahway police stating that the petitioner had been arrested for "attempted rape," and the police in the neighboring communities having unsolved sex crimes were specifically alerted (App. *Infra* 36).

Having thus falsely dubbed him a sex offender and communicated this characterization of him to the two women who had expressly failed and refused to identify him at Belle Mead, the police finally got the desired result. Both Miss Stiles of Westfield and Miss McLaughlin of Cranford completely reversed themselves. Each then identified the petitioner as her assailant.

Similarly, the police of Bound Brook, N. J., brought a Miss Cora DeGraaf who had been the object of an attempted rape in that town to confront the petitioner after the Rahway arrest, and the petitioner was thereupon indicted for that attempted rape. His conviction on this indictment has been reversed by the Supreme Court of New Jersey on a finding that the prosecutor grossly overreached at the trial (*State* v. *Landeros*, 20 N. J. 69, 74-75 (Sup. Ct. 1955)).

And it is of interest to note that the indictment of the petitioner for assault and battery arising out of the Rahway incident was *nolle prossed.** Moreover, no charges with respect to the Cranford rape have ever been brought to trial.

How the Federal Issue Was Raised

The federal question sought to be reviewed was raised sharply and precisely in the petitioner's reply brief to the State's brief when it first began to appear as a result of some statements in the State's brief that facts had been suppressed (App. *Infra*, 37), in petitioner's supplemental memorandum based upon the new evidence which resulted

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* While it may be that one of the reasons for the *nolle prosse* of this Rahway indictment was the decision of the Supreme Court of New Jersey in *State* v. *Maier*, 13 N. J. 235 (Sup. Ct. 1953) holding assault and battery not to be an indictable offense, no substitute proceeding has been brought against petitioner.

from the court's bringing before it the heretofore secret police files (Supplemental Mimeographed Memorandum p. 10; App. *Infra*, 41), and again at extensive length in petitioner's petition to the Supreme Court for rehearing (App. *Infra*, 43).

The portions of the record relied upon are set forth in the Appendix hereto (App. *Infra*, 37 *et seq.*).

The Reasons Relied on for the Issuance of the Writ

The State court has, in a case depriving the petitioner of his liberty for a term of ten to twelve years (Print. App. 198a-33), so narrowly conceived the requirements of due process as to conflict with principles laid down by this Court.

The nondisclosure by the prosecution of pertinent facts in its possession which may establish or help to establish the innocence of the petitioner constitutes a flagrant denial of due process of law, requiring reversal of this conviction. The opinion of the Supreme Court of New Jersey, notwithstanding the issue was sharply raised, is silent upon this issue, which is of decisive importance to the proper administration of justice.

None of the new matters brought out for the first time before the Supreme Court and never revealed to the jury is tangential; separately and collectively they deal with the nub of the case. Indeed, it cannot be gainsaid that these facts would normally have switched the balanced facts to a verdict of not guilty. And in any event it is clear that these facts went to the very heart of the main factual issue—Lois Stiles' credibility.

Deliberately kept in ignorance by the prosecution as it was, the jury could not possibly have made a fair and accurate appraisal of her credibility because evidence in the possession of the prosecution alone, proving that her state-

ments at the trial were knowingly false, was suppressed by the prosecution.

The facts as they evolved before the Supreme Court of New Jersey thus bring this case squarely within the standards of due process of law enunciated in *Pyle* v. *Kansas*, 317 U. S. 213 (1942); *Mooney* v. *Holahan*, 294 U. S. 103 (1935), rehearing denied, 294 U. S. 732 (1935); and *Chessman* v. *Teets*, —— U. S. —— (Oct. 17, 1955). In fact, the case here made is stronger than those heretofore considered by this Court in the cited cases for here the falsity of the State's case is established by uncontradicted police records. There is accordingly no necessity for a hearing to determine the factual issue as to whether the testimony at petitioner's trial was false. The trial jury should under any circumstances have had the important information which now has been disclosed by the uncontradicted police files.

A case strikingly similar in many respects to the instant case is *United States ex rel. Montgomery* v. *Ragen*, 86 F. Supp. 382 (D.C. N.D. Ill. E.D. 1949). There, the prosecution had knowingly suppressed a statement by an attending physician that the crime of rape for which the defendant there was convicted was, in fact, never committed. There, as here, a Negro was charged with rape by a white woman. The court emphasized the special burdens of a Negro defendant charged with the rape of a white woman. It excoriated the suppression by the prosecution of evidence favorable to the defendant, holding (86 F. Supp. at 387).

> "It is repugnant to the concept of due process that a prosecutor introduce everything in his favor and ignore everything which may excuse the accused for the crime with which he is charged. It is manifest in this matter that someone identified with the prosecution, as the circumstances indicate very clearly, ignored a material

> piece of evidence which, if it had been brought to the attention of the jury or the trial judge, would certainly have resulted in the acquittal of this relator. * * *
>
> * * *
>
> "There was no trial here but a sham, one of false pretenses, and fraud. * * *"

The denial of the petitioner's constitutional rights in the face of the disclosures made in the secret police files is not substantially disputable.

This Court should grant certiorari to correct this denial of constitutional rights for the following reasons:

1. At issue in this case is a type of prosecution which goes to the heart of the fair administration of justice. The silence of the Supreme Court of New Jersey on this point, notwithstanding the fact that the issue was before it, makes it all the more important that this Court exercise its corrective jurisdiction.

2. It would seem pointless and unseemly to force the petitioner to engage in the now-familiar round of *habeas corpus* proceedings, beginning with the federal district court. This Court now has before it a record from which it can at this time determine the constitutional implications of the suppression of facts. As the Court pointed out in *Darr* v. *Burford*, 339 U. S. 200, at 216:

> "It is this Court which ordinarily should reverse State court judgments concerning local criminal administration."

In that case, this Court insisted that the filing of a petition for certiorari was indeed a condition for any subsequent relief by way of a writ of *habeas corpus* in the federal courts. Granted that a denial of such a writ has no substantive significance in subsequent *habeas corpus* pro-

ceedings, *e.g., Brown* v. *Allen*, 344 U. S. 443, the Court should not, in a case where the record at this stage permits of final disposition, deny to the petitioner the opportunity for speedy and final vindication of his constitutional rights.

CONCLUSION

We respectfully submit that this Court should grant certiorari and dispose of the important federal issues herein raised.

Respectfully submitted,

J. Mercer Burrell,
Attorney for Petitioner.

Morton Stavis,
Of Counsel.

Dated: March 16, 1956.

APPENDIX A

Opinion of Supreme Court of New Jersey (20 N. J. 76, Sup. Ct. 1956)

On appeal from the Union County Court, Law Division.

Mr. Morton Stavis argued the cause for appellant (*Mr. J. Mercer Burrell,* attorney).

Mr. Chester A. Weidenburner, Assistant Prosecutor of Union County, argued the cause for the State (*Mr. H. Russell Morss, Jr.,* Prosecutor, and *Mr. Hyman Isaac,* Assistant Prosecutor, attorneys).

The opinion of the court was delivered by

WACHENFELD, J. The principal issue in this appeal is whether, on the record before us, it "clearly and convincingly appears" that the verdict of "guilty" returned by the jury was so contrary to the weight of the evidence as to be "the result of mistake, partiality, prejudice or passion." See *R. R.* 1:5-1(*a*).

The indictment charges that on January 30, 1953 in Westfield, Union County, the defendant had carnal knowledge of the complaining witness forcibly and against her will. From the judgment of conviction the defendant appealed directly to this court, we having granted certification in advance in view of the relationship between the instant case and *State* v. *Landeros,* 20 *N. J.* 69 (decided November 21, 1955).

The complaining witness at the time of the attack was a girl 19 years of age and 21 at the time of trial. The rape itself was established by her uncontradicted testimony, corroborated by a physician who examined her shortly thereafter.

The guilt or innocence in this case, as it so often does in this classification, hinges almost solely on the identification of the defendant as the perpetrator of the crime.

The following is a synopsis of the testimony for the State and the defense.

The complaining witness testified that at approximately 10:15 P.M. on the evening of January 30, 1953 she, unaccompanied, left a soda parlor and was walking on Broad Street, Westfield, in the direction of her home. She observed a colored man approaching, about 5 feet 8 in height, wearing a "bee-bop" hat, a short, close-fitting jacket and light pants. He was wearing old shoes and the collar of his jacket had markings across the front.

As she passed him she became "kind of frightened" and started to go off the sidewalk. He walked past but whirled around, grabbed her, placing his hand over her face, and dragged her about 100 feet into a vacant lot. He demanded money of her and after she gave him what money she had, he then proceeded to commit the rape. The lurid details will be omitted.

She had an opportunity to observe her assailant's face when he was perpetrating the crime and noticed he had a mustache. She observed his hand and noticed he was wearing a double-banded wedding ring. At the trial she unhesitatingly and definitely identified the defendant as the man who had committed the attack.

On cross-examination it developed she had seen the defendant on two occasions after the attack, the first on February 3, 1953—four days later—when she was taken by Westfield police to Belle Mead, where the defendant was employed. There she failed to identify him as her assail-

ant. She was unable to recall the details of that confrontation but acknowledged she had felt his hands and observed he wore a wedding ring.

Concededly, her testimony as to the Belle Mead incident was vacillating and uncertain and undoubtedly affected her credibility in so far as her identification of the defendant was concerned. Thus, she testified that at Belle Mead she had recognized the defendant's voice as that of her attacker and had communicated this fact to the police officers who accompanied her. Subsequently she reversed herself in this respect and said she had not given any indication to the police officers that she could identify the defendant but attempted to say she had communicated this information to a friend, which testimony was, of course, stricken.

She next saw the defendant on March 9, 1953 at the police station in Rahway. He had been taken into custody the day before in connection with an attack upon another woman and the Rahway police had sent out a teletype saying they had in their custody a man who had been arrested for attempted rape. The complaining witness was taken to the Rahway jail by Westfield police officers, where she immediately recognized and positively identified the defendant as he was led down a hall toward her.

Detective Duelks of the Westfield Police Department, who accompanied the complaining witness to Rahway, testified the identification was made of the defendant while he was standing five feet away from the complaining witness and the defendant did not attempt in any way to deny the accusation but remained silent.

With the exception of the testimony of the physician who attended the complaining witness, this comprises practical-

ly all of the evidence produced by the State in its effort to prove the allegations in the indictment.

The defense was an alibi. The defendant testified that on the night in question he was working at Ronnie's Garage in Scotch Plains welding manifolds for racing cars. He was there from approximately 7 P. M. until after 11 P. M. that night. He was regularly employed at Belle Mead and had a second job cleaning offices in a building, but on the night in question he was working in Ronnie's Garage under an arrangement whereby the garage owner permitted him to repair his own automobile in return for which he put in the same number of hours working on automobiles for the owner.

The defendant's alibi was supported by three witnesses, John Rogerson, Louis Yanotta and Michael Fiore. They were all working in Ronnie's Garage on the night in question and testified the defendant was there working on cars during the entire evening and did not leave until 11 P. M. These witnesses had known the defendant for only a period of two weeks prior to the incident itself and each described a reason for his ability to recall the night in question.

Rogerson was entered in a race at Kingsbridge Armory the following evening, January 31, which was a Saturday. He recalled the defendant on Friday night, January 30, helping him get his car ready for the race.

Yanotta testified January 30 was his birthday and he had taken a piece of birthday cake to the garage, giving it to one of his friends. He likewise said the defendant was at the garage until 11 P.M.

Fiore recalled the incident of the birthday cake and corroborated the other witnesses.

A fourth witness, the garage owner, was not present on the night in question. He testified that through his manager arrangements had been made with the defendant whereby he would be permitted to use the garage and that his manager had made a report on the basis of which the witness made an entry in his books as follows: "Landeros, OSL 26-30 repairs to racer body and exhaust, to repay by use of shop for repairs on Chrysler." He said the numerals "26-30" referred to the dates January 26 through January 30. Clark, the manager, who was supposed to have been present on the night of January 30, was not called because he could not be located.

As to the confrontation at Belle Mead, the defendant testified he was called from his work to meet the complaining witness. He was asked whether he spoke any Spanish or Portuguese and if he walked with a limp, both of which he answered in the negative. He was asked to hold out his hands and the complaining witness rubbed them, a fact which she confirmed in her testimony. He was then asked whether he had an Air Force jacket with a fur collar and he replied he did not but that he had a Navy foul weather jacket. He was sent to get the jacket and returned, put it on and walked up and down in front of the complaining witness. He said she shook her head and said, "No," indicating he was not the man.

Concerning the Rahway identification, he testified he was brought into a room where the complaining witness was and one of the detectives pointed to him and said: "That's the man, isn't it?" to which the complaining witness replied, "Yes." He admitted his silence following this identification but explained it by saying he was not asked to participate in any conversation between the complaining witness and the police officers and nothing was asked of him.

The case was submitted to the jury under a charge to which not only was no objection taken by the defendant but which consisted in major part of requests submitted and in the language employed by him.

The defendant's counsel now urges:

> "The defendant in this case was found guilty upon uncorroborated identification testimony, so contradictory, so impossible of belief, that it cannot possibly be a legally competent foundation for convincing a jury beyond a reasonable doubt."

To support this view, the defendant points principally to the testimonial contradictions of the complaining witness respecting the Belle Mead confrontation and her failure to identify the defendant on that occasion; the omission of any reference to a mustache in the description of the assailant entered upon the Westfield police blotter immediately after the attack, where as the defendant in fact has a very prominant mustache; the misdescription of the defendant as being 5 feet 6 inches in height in the police blotter entry whereas the defendant actually is 5 feet 10 inches; the complaining witness' misdescription of the jacket worn by her assailant, *i. e.*, that it had markings across the front whereas the jacket offered in evidence by the State had no markings in that location; and the complaining witness' testimony that her assailant spoke in a foreign language whereas the defendant does not.

Stressing these as weaknesses and variations in the complaining witness' testimony not evident in the defendant's corroborated alibi, the defendant insists he comes within the purview of *R. R.* 1:5-1(*a*) entitling him to a new trial.

But the power of an appellate tribunal to reject the findings of a jury is subject to limitations. In the first

instance, we may not interfere with the constitutional right of trial by jury by weighing the evidence and substituting our judgment for that of the jury. *Hager* v. *Weber*, 7 N. J. 201, 210 (1951); nor may we set aside a verdict merely because, in our opinion, we or the jury upon the same evidence might have found otherwise, *Boesch* v. *Kick*, 97 *N. J. L.* 92, 97 (*Sup. Ct.* 1922); *VanPelt* v. *Hartough*, 31 *N. J. L.* 331, 335 (*Sup. Ct.* 1865); *Hager* v. *Weber*, *supra;* so long as "a verdict * * * rests upon testimony competent to sustain the inference implied in such a finding [it] is ordinarily conclusive" upon us, *Hager* v. *Weber*, *supra;* for "our review upon appeal is aimed only at correcting injustice resulting from obvious failure by the jury to perform its function," *State* v. *Haines*, 18 *N. J.* 550, 565 (1955), and the error of the verdict must appear to us as an "inescapable conclusion," *Hager* v. *Weber*, *supra.*

All of these expressions have the same general meaning and are merely crystallized in the present statement of *R.R.* 1:5-1(*a*) that:

> "A verdict of a jury shall not be set aside as against the weight of the evidence unless it clearly and convincingly appears that the verdict was the result of mistake, partiality, prejudice or passion."

After careful consideration of all of the evidence and every aspect of the defendant's contention, we are satisfied that on the record we should not, within the limitations upon our appellate function as enumerated and outlined above, set aside the verdict against the defendant in the case *sub judice.*

The trial court, at the defendant's insistence, specifically charged that in considering the weight to be given to the alleged identification of the defendant by the complaining

witness it "must consider her prior failure to openly identify the same defendant at Belle Mead Depot * * *." It likewise charged:

> "The jury must weigh and consider all the evidence, including any contradictions and inconsistencies in the evidence, including the question of identification and the weight of such identification, and if the jury, after considering and weighing all the evidence, is not satisfied beyond a reasonable doubt that the complaining witness has identified the defendant as her attacker accurately and truthfully, he should be acquitted."

Thus, the same contentions made here by the defendant were submitted to the jury in the very language selected by the defendant for the jury's consideration in determining the factual equation.

The complaining witness, in open court, with full knowledge of the consequences of her act, definitely and positively identified the defendant as her assailant. The extent to which her testimony should be believed, taking into account all the factors enumerated which may have a tendency to raise some aura of doubt, was, we believe, properly a question for the jury and we find no justification in the record or under our rule for substituting our judgment for theirs.

Counsel for the defense and the prosecutor of the pleas, evincing firm faith in their respective beliefs, in a rather unusual procedure consented to our going outside of the record in an effort to find further light by examining documentary material which was subsequently offered as having some bearing upon certain disputed questions of fact relating to the issues presented to the jury. This material, although helpful, had no persuasive significance in our ultimate determination.

Opinion of Supreme Court of New Jersey
(20 N. J. 76, Sup. Ct. 1956)

Finally, it is urged error was committed in the admission of Detective Duelks' testimony that the defendant said, "Nothing," when in his presence and within his hearing he was identified by the complaining witness at the Rahway Police Station, and in the failure of the court to charge the jury as to the weakness of this type of evidence as an admission by the defendant.

Evidence of the defendant's silence when accused of criminal activities, even where at the time the accusation is made he is in the custody of the police, is admissible. *State* v. *Lambertino*, 13 *N. J. Misc.* 687 (*Sup. Ct.* 1935); *State* v. *Claymonst*, 96 *N. J. L.* 1 (*Sup. Ct.* 1921); *State* v. *Rosa*, 72 *N. J. L.* 462 (*E. & A.* 1905); *State* v. *D'Adame*, 84 *N. J. L.* 386 (*E. & A.* 1913); *Donnelly* v. *State*, 26 *N. J. L.* 601, 613 (*E. & A.* 1857); *State* v. *Sorge*, 125 *N. J. L.* 445 (*E. & A.* 1940).

In so far as the court's charge is concerned, the defendant made no request to charge as to the weakness of the "admission" evidence and did not object to the charge as given. There was no obligation, under these circumstances, on the part of the trial court to charge specifically with reference to this testimony inasmuch as it was clearly established that the defendant heard the accusation when it was made.

The judgment of conviction below will be affirmed.

For affirmance—Chief Justice Vanderbilt, and Justices Wachenfeld, Jacobs and Brennan—4.

For reversal—Justices Heher, Oliphant and Burling—3.

APPENDIX B

Mandate of Affirmance by Supreme Court of New Jersey of Judgment of Conviction of Union County Court, New Jersey

This cause having been duly argued before this Court by Mr. Morton Stavis, counsel for the appellant and Mr. Chester A. Weidenburner, Counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Union County Court is affirmed with costs; and it is further ordered that this Mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Union County Court to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton on the 21st day of November, 1955.

/s/ JOHN H. GILDEA
Clerk of the Supreme Court

A TRUE COPY
/s/ JOHN H. GILDEA
Clerk

FILED
Nov 21 1955

John H Gildea
Clerk

APPENDIX C

Order of Supreme Court of New Jersey Denying Petition for Rehearing

This matter having been duly presented to the Court, and no justice who voted with the majority having moved for a reconsideration, it is ordered that the petition for rehearing is denied.

Witness, the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton, this nineteenth day of December, 1955.

/s/ JOHN H. GILDEA
Clerk

FILED
Dec 19 1955

John H. Gildea
Clerk

A TRUE COPY
/s/ JOHN H. GILDEA
Clerk

APPENDIX D

New Evidence Admitted to Record on Approval of Motion to Enlarge the Record

(The documents appearing in Appendix D were included in the record as a result of an order of the Supreme Court of New Jersey granting the petitioner's motion to enlarge the record.)

1. Order of Supreme Court of New Jersey Granting Motion

This matter having been duly presented to the Court, it is Ordered that the motion to enlarge the record is granted.

Witness, the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton, this twenty-seventh day of June, 1955.

JOHN H. GILDEA
Clerk

Filed June 27, 1955

2. Two photographs



New Evidence Admitted to Record on Approval of Motion to Enlarge the Record

3. Police Records of Physical Description of Petitioner Made March 11, 1953

Bureau of Identification

Office of the Sheriff, County of Union, Elizabeth, N. J.

Name Albert H. Landeros Bur. No. 21502

Alias Albert Hernan Landerous (cn)

Res. 12 Berkeley Terr., Plainfield, NJ

Born 7-22-26 Place Plainfield, NJ

Occup. Welder

Height 5-10 Weight 152 Build Med

Hair Blk Wvy Eyes Marn Comp. Lt. Bro. N

Marks Pock Marks; Cntr Fhd;

4. Teletype sent out by Rahway Police Department, March 9, 1953

"Newark N.J. 3699 Police Information 3-9-53 Arrested for Attempted Rape:

Albert Herman Landeros

12 Berkeley Terr., Plainfield, N.J.

Age 26 Colored 5'11" 156 lbs.

Slim Build Black Hair Brown Eyes

Brown Complexion

Attn. Cranford, South Plainfield & Westfield N.J.

PDS—Authority Rahway, N.J. P.D. (Advise any record or wanted)
0900 RAB-F BEHMNPUYK"

APPENDIX E

Extract from Petitioner's Reply Brief Raising Federal Constitutional Issue

We pointed out in our main brief (Db10-27 *et seq.;* Db32-34 *et seq.*) that Miss Stiles swore unequivocally that she recognized the defendant's voice at Belle Mead and communicated this recognition to the Chief and the Lieutenant of Police of Westfield (D27a-38, D31a-7, D31a-10).

We noted further that the State never called these superior officers as witnesses, despite the fact that their testimony was admissible for rebuttal purposes (Db33-1 *et seq.*) and that the legitimate inference of such failure to call the police officers is that, if produced, they would not have corroborated her testimony since otherwise their failure to arrest the defendant is inexplicable (Db32-27 *et seq.*). And we emphasized the inevitable conclusion that the police and the prosecution know more than has yet been revealed as to what really happened at Belle Mead (Db34-10) and that the truth is unfavorable to Miss Stiles' subsequent identification of defendant as the assailant.

The State's reply to this (Pb9-2 *et seq.*) is most revealing:

> "Defendant attacks the absence of any confirming testimony by police officers of that of the complaining witness with respect to her recognition of defendant at Belle Mead and her disclosure of that recognition (Db10-27-37, Db11-1-16). It must be noted that defendant was free at trial to cross examine into these

Extract from Petitioner's Reply Brief Raising Federal Constitutional Issue

> matters and thus lay proper foundation for rebuttal witnesses by propounding questions as to the persons to whom these disclosures were made, to whom the assailant was described, the substance of the description, and other related questions. The State enjoyed no such liberty at trial in this regard, for such questioning would have been subject to objection because of its impeaching character. *State* v. *Young, 93 N. J. L. 396 (E. & A. 1919); State* v. *Cooper, 10 N. J. 532 (1953).*"

We assume the State means what it says in its brief, and if so the State seems to concede that it has information as to what actually occurred at Belle Mead which would destroy Miss Stiles' story.

The testimony of the police officers would either *corroborate* or *impeach* Miss Stiles' testimony. If it would have corroborated it, the testimony would have been admissible by way of rebuttal. If it would have impeached it—and the State insists in its brief that such would have been the effect of the testimony—then was not the jury—and is not this Court—entitled to know the truth? Shall this defendant languish in jail on the basis of a false presentation of his case—when the State knows the truth to be something different from what was told to the jury?

The State's position seems to be that it is not the duty of the prosecution to disclose contradictory statements it knows its chief witness has made to others; and that such evidence, uncontradicted by evidence in its own possession and, in fact, deliberately suppressed, takes on the element of finality if it "gets by" and is accepted by a jury kept in ignorance of the true facts.

Extract from Petitioner's Reply Brief Raising Federal Constitutional Issue

Such is not our concept of justice or of the function of the prosecution, e.g., *Berger* v. *United States, 295 U. S. 78, 88 (1934)*; *State v. Orecchio, 16 N. J. 125, 140-141 (Sup. Ct. 1954)*.

Moreover, nondisclosure by the prosecution of pertinent facts in its possession which may establish or help to establish the innocence of the defendant constitutes a flagrant denial of due process of law, requiring reversal of this conviction. Thus, in *Pyle v. Kansas, 317 U. S. 213 (1942)*, the Supreme Court reversed a conviction on the grounds, *inter alia,* that the State deliberately suppressed testimony favorable to the defendant. Such too is the law in our State, *State v. Cooper, 2 N. J. 540, 554 (Sup. Ct. 1949)*. [Emphasis supplied in this appendix]

APPENDIX F

Extract from Petitioner's Mimeographed Supplementary Memorandum Raising Federal Constitutional Issue

With the police records now before the Court we at last have the explanation for the statement in the brief of the prosecutor that (Pb9-2 *et seq.*):

> "Defendant attacks the absence of any confirming testimony by police officers of that of the complaining witness with respect to her recognition of defendant at Belle Mead and her disclosure of that recognition (Db10-27-37; Db11-1-16). It must be noted that defendant was free at trial to cross examine into these matters and thus lay proper foundation for rebuttal witnesses by propounding questions as to the persons to whom these disclosures were made, to whom the assailant was described, the substance of the description, and other related questions. The State enjoyed no such liberty at trial in this regard, for such questioning would have been subject to objection because of its *impeaching character.*" (Emphasis supplied.)

But however the prosecution may have ignored its responsibilities at the trial not to withhold facts which established the falsity of the testimony there presented (cf. our reply brief, Db2-5 to Db3-3), this Court should correct this grave error.

Our system of justice does not permit a conviction to stand under circumstances where the prosecution deliberately suppresses evidence favorable to the defendant. See

Extract from Petitioner's Mimeographed Supplementary Memorandum Raising Federal Constitutional Issue

Pyle v. *Kansas*, 317 U. S. 213 (1942); *State* v. *Cooper*, 2 N. J. 540, 554 (Sup. Ct. 1949).

We respectfully submit that had all the facts of this case been known to the lower court, a judgment of acquittal was indicated. But, certainly, the least that can be said was that the jury should have had all the facts, and that a verdict based upon deliberate withholding of the decisive facts now before the Court cannot stand.

APPENDIX G

Extract from Petition for Rehearing Raising Federal Constitutional Question

ARGUMENT

POINT I

The defendant was denied due process of law under the Fourteenth Amendment of the Federal Constitution and Article I, Par. 1 of the Constitution of New Jersey by a conviction based upon testimony known by the law-enforcement arm of the government to have been false and under circumstances where evidence favorable to the defendant was knowingly suppressed by law-enforcement officers.

MAY 13 19
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 774.

ALBERT HERMAN LANDEROS,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

H. RUSSELL MORSS, JR.,
County Prosecutor,
AND
CHESTER A. WEIDENBURNER,
First Assistant Prosecutor,
Union County, New Jersey,
Attorneys for Respondent.

HYMAN ISAAC,
Special Assistant Counsel,
Of Counsel for Respondent,
Union County Court House,
Elizabeth, New Jersey.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.

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CITATIONS.

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IN THE

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ALBERT HERMAN LANDEROS,
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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Questions Presented.

1. Should the Supreme Court of the United States grant *certiorari* when a State court has decided a question in accordance with the applicable decisions of this Court?

2. Is a petitioner entitled to *certiorari* solely upon the allegation of a denial of due process under the Federal Constitution when the facts disclose no essential unfairness affecting the trial at which he was convicted?

Statement of the Case.

Petitioner was convicted of the rape of Lois Ann Stiles after a 4 day trial (R191a-35). Threafter, he appealed to the Superior Court of New Jersey, Appellate Division (R2a), but the Supreme Court of New Jersey certified the appeal directly to itself in view of the relationship of the case to another conviction of rape involving the petitioner then before that Court (see Petitioner's Appendix A, p. 21). In his briefs petitioner contended that the trial court erred in admitting evidence of his silence when identified and accused of the crime by Miss Stiles at Rahway, N. J., after his arrest for an attack upon a girl in that city. that the trial court erred in not cautioning the jury as to the effect of such testimony and that the verdict did not establish his guilt beyond a reasonable doubt. On oral argument before the Supreme Court of New Jersey petitioner's counsel charged that the petitioner was the victim of a police "plot" to pin unsolved crimes upon him—a charge he also made in his brief (see Petitioner's Brief, Supreme Court of New Jersey, p. 2).

Although the State began its oral argument, it was not able to conclude the same before the Court rose for the day. During the week intervening between that time and the next sitting of the Court, at which the State was to finish its argument, the Supreme Court of New Jersey inquired whether both sides would consent to having the State obtain and produce public records of the Police Department and Magistrate's Court of Plainfield, N. J., concerning charges made against petitioner some 5 months prior to the date of the crime in the instant case; the public records

of the Police Department of Cranford, N. J., concerning a rape case in that municipality on November 1, 1952, with which petitioner was charged after his arrest on March 9, 1953, and the subsequent identification by the victim; the public records of the Police Department of Rahway, New Jersey, of the facts and investigation of an attack unquestionably made by petitioner on a girl in that City on March 8, 1953; the public records of the Police Department of Westfield, N. J., made in the course of the investigation of the instant case; and the Pre-sentence Investigation and Psychiatric Report on the petitioner made by the Probation Department of Union County, N. J. Both sides consented and the prosecution obtained said records and presented them, together with supplemental statements of the victims in the instant case and the Cranford case made to the staff of the County Prosecutor after they identified petitioner, to the Court. Those records are all before this Court in the appendices to the State's and Petitioner's Supplemental Memorandums, Supreme Court of New Jersey.

The same allegation made here, that he was denied his constitutional right of due process under the Federal Constitution, was made to the State Supreme Court (Petitioner's Appendix E, p. 39; Petitioner's Appendix F, p. 41, 42) by the petitioner. Several weeks after the conclusion of argument and the submission of both Supplemental Memorandums and Appendices, the State Court affirmed petitioner's conviction and rendered a written opinion (Opinion of Supreme Court of New Jersey, Petitioner's Appendix A, p. 21 et seq.).

The State Court's opinion left no doubt that it affirmed petitioner's conviction after "careful consideration of all

of the evidence and every aspect of the defendant's contention" (Opinion, Supreme Court of New Jersey, Petitioner's Appendix A, p. 27). It appraised the police records furnished by the State, which petitioner alleged showed a denial of due process, in the following language (Opinion, Supreme Court of New Jersey, Petitioner's Appendix A, p. 28):

> "Counsel for the defense and the prosecutor of the pleas, evincing firm faith in their respective beliefs, in a rather unusual procedure consented to our going outside of the record in an effort to find further light by examining documentary material which was subsequently offered as having some bearing upon certain disputed questions of fact relating to the issues presented to the jury. This material, although helpful, had no persuasive significance in our ultimate determination".

Subsequently, a petition for rehearing in which petitioner again raised the claim of a denial of a constitutional right was denied by the State Court (Petitioner's Appendix C, p. 33).

The facts as they were presented to the trial court and jury are succinctly summarized in the opinion of the Supreme Court of New Jersey (Petitioner's Appendix A, p. 21 et seq.) and will not be repeated here in the interest of brevity. It is significant to note, however, that the petitioner neglects to direct the attention of this Court to the fact that the testimony of the complaining witness in the trial court had cogent corroboration from the testimony concerning the silence of the petitioner when he was spontaneously accused of the crime at Rahway by the complain-

ing witness (Opinion of Supreme Court of New Jersey, Petitioner's Appendix A, p. 23 and p. 29). At the trial Detective Duelks testified that Miss Stiles accused the petitioner of being the one who attacked her when the petitioner was approximately five feet from her and the petitioner did not deny it but said nothing (R 54a-1 to 10; R 169a-20 to R 170a-21).

Significantly, too, petitioner is completely silent as to the effect of the testimony of the Rahway police officers as to his attire when he was apprehended and a prisoner at Rahway on March 9, 1953 on the jury's estimate of the credibility of the petitioner. He denied under oath that he was wearing a jacket (Exhibit S-2, R6a, 7a, 168a) when he was arrested in Rahway for an attack upon another young woman (R125a-9 et seq.). Lt. Kinch of the Rahway police testified, however, that the petitioner was wearing the jacket over the suit coat (R164a-19 to 30) and Detective Duelks testified that the petitioner was wearing the jacket over the suit coat rolled up beneath it (R165a-12).

The respondent deems it necessary to correct certain inaccuracies and omissions in the petitioner's statement of the case.

Miss Stiles had more than the momentary glimpse of her assailant that petitioner suggests. She left no doubt in the minds of the trial court and jury that she clearly saw the face of the petitioner (R10a-14), that she noticed his mustache (R9a-31) and observed the double banded wedding ring of the petitioner while he "had his hand on his private" (R9a-27), right "in front of her face" (R10a-19) in the course of the revolting ordeal to which he subjected the young lady (R9a-37).

Although petitioner states that the reason for Miss Stiles being taken to the Army depot at Belle Mead was never explained, the record discloses that she clearly stated that she was taken to that place by the police officers to "look at a suspect" (R26a-20 to 25).

It is patent that the petitioner inaccurately describes the facts surrounding his arrest for the Rahway attack upon Mary Ferranti. He says the attack took place "in a bar" upon a lady whom he slanderously described to the psychiatric examiner as a "hussler" (Petitioner's Supplemental Appendix, 33a). This transparent effort to mislead is even carried into this Court in Petitioner's Statement of the Case (Petition for Writ, p. 6). The conspicuous facts are that the attack on Miss Ferranti took place on a dark street in the City of Rahway "at the rear of the Rahway theatre" (State's Supplemental Appendix, 12a). There can be no question of petitioner's involvement in the Rahway attack in view of the record of the pursuit and apprehension of the petitioner and his positive identification by the attacked girl (State's Supplemental Appendix, 10a to 19a). While the attack on Miss Ferranti in all probability was an attempt at rape, if she had been unable to scream (State's Supplemental Appendix, 14a), the statements taken by the Rahway police from witnesses (State's Supplemental Appendix, 14a, 16a) and the report of the Rahway detectives (State's Supplemental Appendix, 18a) made the problem of proof of intent so clear that the ultimate complaint was only for assault and battery (Petitioner's Supplemental Appendix, 28a).

The Rahway Police Department records clearly explain the supposed discrepancy between Miss Stiles' description

of the petitioner as "stocky built" and the petitioner's normal appearance. The bulk of even a 5′ 10″ person is substantially altered when he is as cunningly attired as the petitioner was when arrested in Rahway:

> "At the time of Landeros' apprehension, he was wearing a light grey tweedish sort of suit. Over this suit he wore a very dark blue or black U. S. Navy foul weather jacket with U. S. Navy and Wango Landeros printed on the back" (State's Supplemental Appendix, 18a).

It is impossible to reconcile petitioner's charitable description of himself as a hard-working family man with the facts of the uncontradicted attack upon Miss Ferranti in Rahway, when petitioner was apprehended only after a police pursuit over railroad embankments, fences and yards while petitioner was wearing the Navy jacket over his suit coat to alter his appearance and his condition otherwise described in the police reports (State's Supplemental Appendix, 10a) as follows:

> "When we got him in the light we found blood on his clothing and his fly was open. Miss Ferranti identified him as the man who had attacked her".

We vigorously disagree with petitioner's statement that the original description of the assailant given to the police by Miss Stiles varies from the descriptions she gave the jury. The description given to the police by her immediately after the attack (Petition for Writ, p. 11) is substantially identical with her testimony at the trial (R8a-18 to R11a-5).

Inexplicably, in the light of his present complaint, when the prosecution attempted to show that the statement de-

scribing her attacker given to the police by Miss Stiles on the morning following the rape coincided with her description of the defendant on the witness stand, the petitioner objected on the ground that such testimony constituted hearsay (R49a-35 to R50a-17) in the following manner:

> "Q. On that date did you have occasion to pursue your duties in connection with the case of one Lois Ann Stiles? A. I did, sir.
>
> Q. Did you interview Lois Ann Stiles on the 31st of January, 1953, in connection with the assault and rape on the prior night? A. Yes, sir.
>
> Q. At that time did you obtain from Lois Ann Stiles a description of the person who was alleged to have assaulted and raped her on the previous night?
>
> Mr. Burrell: If your Honor please, I object to that on the ground this is hearsay.
>
> The Court: Well, the answer is yes or no. It Could only be answered yes or no.
>
> A. Yes, sir.
>
> Q. What description was given to you by Lois Ann Stiles of the man who attacked her on the prior night?
>
> Mr. Burrell: I object to that.
>
> The Court: Objection sustained, because it would be hearsay."

The statement that any differences between the original description given by Miss Stiles and the actual physical appearance of the petitioner were never disclosed to the jury is ludicrous when we consider the manner in which she described her assailant while she was a witness (R8a-18 to R11a-5) and the fact that the petitioner was seated in full view of the jury during the entire four day trial.

The contention in this Court—as in the State Court—that the prosecution suppressed evidence is untenable when we observe how the petitioner repeatedly blocked the efforts of the prosecution at the trial to disclose all of the circumstances surrounding the lack of an open identification to police officers at Belle Mead.

When the State sought to have Miss Stiles explain her testimony as to the person to whom she had identified the defendant on the way home from Belle Mead (R45a-16 to R47a-12), the following transpired:

> "Q. Miss Stiles, when you were being cross examined it is my recollection that when you corrected what you had originally said and said that you did not say to the police officers on the way back from Belle Mead, that you were sure that this was the man who attacked you on January 30, you said that you did say you were sure, to someone else, is that correct? A. That's right.
>
> Q. To whom did you say, either at or on the way back from Belle Mead that you were sure that this was the man who attacked you?
>
> Mr. Burrell: I object to that question.
>
> The Court: Do you contend she said that?
>
> Mr. Weidenburner: That is what the witness indicated on cross examination, in response to counsel's question that she did say she was sure to someone other than the police officer.
>
> The Court: The stenographer will read the record if there is any dispute. It is not for her to say. It is for the record to say.
>
> (At this point the previous testimony of the witness was repeated as follows.)
>
> Q. At Belle Meade or on your way from Belle Mead to Westfield did you say to either the Lieuten-

ant or the Chief, 'I am sure that this is the man'? A. No, I wish to correct that to say it was somebody else. That is the part I wanted repeated because I made a mistake. I mentioned that to somebody else but not to these officers.)

Mr. Burrell: If your Honor please, at this time I move to strike out the portion in which the witness said it was somebody else, as not responsive to the inquiry. In fact, it is not responsive to any question, it is a voluntary correction by the witness of a previous answer to my question, bringing in parties other than the police officers whose activities were then being questioned. I asked no question as to who did she say it to or did she say it to anyone else. I ask what she said to the Lieutenant or the Captain.

The Court: What she told anybody at the time is not evidence, anyway, and the jury is so instructed.

Mr. Burrrell: Will your Honor rule on my motion to strike . as not responsive to any question of mine?

The Court: It is not evidence, anyway, no matter what she said to anybody at that time, it is not evidence, therefore, it is stricken out. Is that satisfactory?

Mr. Burrell: Yes, sir.

Q. Although you did not tell the police officers either while at Belle Mead or on the way returning from Belle Mead, that you were sure that this defendant was the man who attacked you on January 30, 1953, did you tell anyone else?

Mr. Burrell: If your Honor please, I object to that.

The Court: I have already said anything she told to anyone else on that trip home is not evidence and cannot be shown. It is hearsay.

Mr. Weidenburner: It is the State's position that counsel on cross examination has made much ado about the fact that this witness must have told the police or the security officers, and the State is entitled to explain that.

Mr. Burrell: If your Honor please, I move that the jury be excluded at this time. The prosecutor is now trying to show by indirection what it cannot do by direction.

The Court: Objection sustained and the jury is instructed not to pay any attention to the question or inference therefrom".

Again, when the prosecution, in a further attempt to present all of the information—evidential or not—to the trial jury, sought to have the complaining witness explain why she did not tell the police officers at Belle Mead that the defendant was the man who had attacked her, the effort was blocked by the objection of the defendant (R47a-30 to R48a-5) in the following manner:

"Q. Would you tell the Court and this jury why you did not tell the police that he was the man who attacked you on January 30, 1953?

Mr. Burrell: If your Honor please, I object to that, the fact stands for itself, she did not tell the police, she made no accusation in the presence of the defendant and her motives or reasons for not doing so were not the cause of redirect examination. Redirect, your Honor well knows, is to appropriate matters that were brought up newly on cross examination.

The Court: Why she didn't do it or did do it is a conclusion. That is not proper evidence. The question is over-ruled."

While petitioner seeks to exploit a report made by Lt. Hann of the Westfield police some 21 days after the trip to Belle Mead (Petitioner's Supplemental Appendix, 5a), he neglects to point out the conflict between that report and one made by Lt. Rosendale on February 5, 1953, much more contemporaneously with the Belle Mead trip (Petitioner's Supplemental Appendix, 21a), which coincides completely with the testimony of Miss Stiles. Additionally, when the State sought to obtain the very information which the petitioner now charges was suppressed, the defendant blocked the effort, stating that he objected unless it was shown that what happened was in the presence of the petitioner (R50a-27 to R51a-15).

The prosecution elicited before the Court and trial jury the names of all persons who went on the Belle Mead trip (R50a-21 et seq.) but the defendant did not choose to call any of those persons as witnesses and indicated that he had "no cross examination" of Lt. Hann (R51a-39).

Reasons for Denying Writ.

1. The Supreme Court of New Jersey did not decide a federal question of substance in a way that conflicts with applicable decisions of this Court.

2. The record of the trial court and the additional documentary material considered by the Supreme Court of New Jersey do not disclose any essential unfairness affecting the trial at which petitioner was convicted or that he was denied any rights under the Federal Constitution.

ARGUMENT.

POINT I.

The petition should be denied because the State court decided the federal question in accordance with the applicable decisions of this Court.

The writ of certiorari is not one of right but of sound judicial discretion and will be granted by this Court only where there are special and important reasons therefor. In the instant case the petitioner has the burden of establishing that the Supreme Court of New Jersey decided a federal question in a way probably not in accord with the applicable decisions of this Court. Rule 19 (a).

Petitioner contends here that the Supreme Court of New Jersey denied him the constitutional right of due process of law as enunciated in *Pyle* v. *Kansas*, 317 U. S. 213, 87 L. Ed. 214 (1942); *Mooney* v. *Holahan*, 294 U. S. 103, 79 L. Ed. 791 (1935); and *Chessman* v. *Teets*, 350 U. S. 3, 100 L. Ed. (Adv. p. 2) (1955). We observe that none of the cited cases involved a proceeding of the nature here sought to be utilized, nor did this Court grant the privilege requested in this case in any of them. It is, however, deemed appropriate to examine the cited cases to determine with exactitude the standards of due process enunciated therein which defendant claims were denied to him in this case.

In *Pyle* v. *Kansas, supra*, this Court reversed the judgment of the Supreme Court of Kansas denying an application for a writ of habeas corpus and remanded the cause

for a hearing, saying only that the allegations of the petitioner would, if proven, entitle him to relief. The language employed by this Court (317 U. S. at p. 215, 216) is as follows:

> "Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal constitution, and, if proven, would entitled petitioner to release from his present custody. Mooney *v.* Holahan, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A. L. R. 406. They are supported by the exhibits referred to above, and no where are they refuted or denied. The record of petitioner's conviction, while regular on its face, manifestly does not controvert the charges that perjured evidence was used, and that favorable evidence was suppressed with the knowledge of the Kansas authorities. No determination of the verity of these allegations appears to have been made. The case is, therefore, remanded for further proceedings."

The case of *Mooney* v. *Holahan, supra,* involved a motion by a petitioner held under a State commitment for leave to file a petition for a writ of habeas corpus. This Court denied the motion on the ground that petitioner had not exhausted the remedies available to him in the State courts. Significantly, as in *Pyle* v. *Kansas, supra,* there was no denial of the petitioner's allegations by the Attorney General of California in the *Mooney* case. Disagreeing with the State officer's contention as to what the re-

quirement of due process under the Federal Constitution consists of, this Court (at 294 U. S. page 112) said:

> "It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of Court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."

The case of *Chessman* v. *Teets, supra,* involved a petition for a writ of certiorari to review the denial by lower Federal courts of an application for a writ of habeas corpus. The petitioner alleged that the California Supreme Court had affirmed his conviction of a crime upon a fraudulent transcript prepared by a corrupt arrangement between the Prosecutor and a substitute reporter after the death of the reporter who acted at the trial. On the record before this Court there was no denial of the petitioner's allegations. The petition was granted and the cause remanded to the U. S. District Court for a hearing on the application for habeas corpus. Citing *Mooney* v. *Holahan, supra,* this Court (at 100 L. Ed. (Adv. p. 3)) said:

> "Without intimating any opinion regarding the validity of the claim, we hold that in the circumstances disclosed by the record before us, the application should not have been summarily dismissed."

All of the foregoing cases are clearly distinguishable from this case, for in the cases of *Mooney* v. *Holahan,*

supra, and *Chessman* v. *Teets*, *supra*, neither state involved made any denial of the petitioner's allegations of fraud or perjury. There is vigorous denial here, which is supported by the facts. In the case of *Pyle* v. *Kansas*, *supra*, the allegations of the petitioner were not refuted or denied, nor was there any determination of the truth of his allegations. In the instant case, in addition to the vigorous denial of the allegations of the petition, all of the allegations were presented to, considered by and rejected by the Supreme Court of New Jersey.

While there is no dispute with the statements made in the cited cases of the principle that a defendant convicted upon perjured testimony, knowingly used by the prosecution, who deliberately suppressed evidence favorable to the defendant, is denied due process of law in violation of the Fourteenth Amendment to the Federal Constitution, the facts in the instant case do not disclose any denial or abridgement of any right of the defendant under the Federal Constitution. Although the petitioner intemperately describes the testimony of the complaining witness as false and irresponsibly accuses the prosecution of knowledge of its falsity and with the deliberate suppression of evidence, nowhere does the record or the documents presented to the Supreme Court of New Jersey justify such extremely distorted characterization. When we consult the record of the trial and observe the efforts of the State to present all of the information—evidential or otherwise—for the consideration of the jury (R45a-16 et seq.; R46a-30 et seq.; R47a-1 to R48a-5; R49a-35 to 50a-17; and R184a-20 to 32), the entirely irresponsible and baseless nature of such charges is made strikingly apparent. We can only assume this factually unjustified attack by the petitioner is a form

of self-deception inspired by that commonly observed facet of human nature which causes the wrongdoer to seek to hold someone other than himself responsible for his present predicament.

The case of *United States* v. *Ragen*, 86 F. Supp. 382 (D. C. N. D. Ill. Ed. 1949) is not apposite. In that case a physician's report which established that the complaining witness had not been raped at all was deliberately suppressed by the prosecution. In the instant case, there is nothing by way of documentary material or otherwise presented to any State court or this court which could establish that the crime with which the petitioner here was charged, was, in fact, not committed.

Even if the testimony of the complaining witness as to the Belle Mead incident is appraised in the manner that the Supreme Court of New Jersey viewed it, as "vacillating and uncertain" and as undoubtedly affecting "her credibility insofar as her identification of the defendant was concerned" (Petitioner's Appendix A, p. 23), her credibility, the extent to which her testimony should be believed, was a question for the jury. The case was submitted to the jury under a charge which consisted in major part of requests submitted by and in the language employed by the petitioner. The jury was, at the request of the petitioner, instructed in an unusually extensive manner on the question of identification and the testimony relating thereto (R187a-23; R187a-27 et seq.; R187a-34 to R188a-10; R188a-28 et seq.).

On appeal from the conviction in the trial court, the Supreme Court of New Jersey found the principal question of identification to be one of credibility, which it held

was one for the jury. (Opinion of Supreme Court of New Jersey, Petitioner's Appendix A, p. 27, 28). That determination by the State Court is entirely in accord with the applicable decisions of this Court.

In the case of *Glasser* v. *United States*, 315 U. S. 60, 86 L. Ed. 680 (1941), this Court (at 315 U. S. page 77) said:

> "The short answer to this is that the credibility of a witness is a question for the jury."

Later, in the same opinion (315 U. S. at page 80) the Court held:

> "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. U. S. *v.* Manton, (C. C. A. 2d) 107 F (2d) 834, 839 and cases cited."

See also, to the same effect, *Goldman* v. *United States*, 245 U. S. 474, 62 L. Ed. 410 (1918); *Stilson* v. *United States*, 250 U. S. 583, 63 L. Ed. 1154 (1919); and *Lavender* v. *Kurn*, 327 U. S. 645, 90 L. Ed. 916 (1945).

The limitation on the power of an appellate tribunal to reject the findings of a jury, recognized by the State Court (Opinion, Supreme Court of New Jersey, Petitioner's Appendix A, p. 26, 27), is in accord with the decisions of this Court. In *Lavender* v. *Kurn*, *supra*, (at 327 U. S. 653), this Court held that the appellate court's function is exhausted when the evidentiary basis of the jury's verdict becomes apparent and "it is immaterial that the Court might draw contrary inference or feel another conclusion more reasonable".

POINT II.

The record in the trial court and the additional documentary material considered by the State Court do not disclose any essential unfairness affecting the trial at which the petitioner was convicted or that he was denied any right under the Federal Constitution.

Petitioner's brief is replete with gratuitous conclusions that the prosecution suppressed evidence, and he makes frequent reference to "secret" and "confidential" police files and reports, seeking, abortively, to suggest that the material contained therein was beneficial and favorable to him and was deliberately concealed from him. He fails, however, to support the slanderous charges and innuendo with any factual showing—or, indeed, any showing—from which any legitimate inference of such conduct on the part of the prosecution might be drawn. All of the documentary material which was voluntarily presented to the Supreme Court of New Jersey is now in the record before this Court (See State's Supplemental Appendix, 1a to 20a; Petitioner's Supplemental Appendix, 1a to 34a). A fair analysis of that mass of documentary material justifies the appraisal of it made by the Supreme Court of New Jersey (Opinion, Supreme Court of New Jersey, Petitioner's Appendix A, p. 28) as follows:

> "This material, although helpful, had no persuasive significance in our ultimate determination".

The complaint, police reports and statements relating to the charge made against the defendant arising out of an attack upon a young woman in Plainfield, New Jersey, on

August 8, 1952, over five months prior to the attack on Miss Stiles involved in the instant case (Petitioner's Supplemental Appendix, 10a to 17a), could not by any stretch of the imagination be regarded as relevant, material or competent in the trial of the case *sub judice*. Nor can we conceive that the Rahway police reports and the statements of witnesses concerning the attack the petitioner made upon Mary Ferranti in that City on March 8, 1953, despite the manner in which the early reports by the patrolmen described the attack (See State's Supplemental Appendix, 10a to 19a; Petitioner's Supplemental Appendix, 28a, 28aa), were in any respect material or relevant upon the question of the guilt or innocence of the petitioner in the instant case.

The great bulk of the material from the files of the Cranford Police Department (Petitioner's Supplemental Appendix, 18a to 24a) was patently inadmissible in the trial of the petitioner in the instant case involving the rape of Miss Stiles in Westfield, because it related to an entirely separate, distinct and unconnected crime charged to petitioner and would have been incompetent as prejudicial to him.

Neither the Bill of Particulars on other indictments pending against the petitioner arising out of the Cranford attack (Petitioner's Supplemental Appendix, 25a, 26a), the blotter entry of the Scotch Plains police department (Petitioner's Supplemental Appendix, 27a) nor the Probation and Psychiatric report (Petitioner's Supplemental Appendix, 29a to 34a) would have been admissible in the trial of the instant case, for none of those documents have any materiality or relevance in the case *sub judice*.

The only additional information provided by the police records before the Supreme Court of New Jersey, which was not before the trial court and jury, is contained in the supplemental statement of the complaining witness and Miss MacLaughlin (State's Supplemental Appendix, 1a to 9a) and the report of Lt. Hann, dated February 25, 1953 (Petitioner's Supplemental Appendix, 5a). Examination of that documentary material discloses nothing that was not presented testimonially before the trial court and jury. Analyzed in the light most favorable to the petitioner, that material shows only that which the complaining witness admitted on several occasions at the trial, that she did not identify the petitioner at Belle Mead (R35a-40; R43a-13). What, then, was suppressed by the prosecution? What, then, was ignored by the State court in its decision?

The obligation of one seeking the aid of this Court on a claim that he was denied his constitutional right of due process is to show essential unfairness as a demonstrable reality, not as a matter of speculation. In *Adams* v. *United States*, 317 U. S. 269, 87 L. Ed. 268, 143 A. L. R. 435 (1942), this Court (317 U. S. at p. 281) said:

> "If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the results set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality."

To the same effect, see *Buchalter* v. *New York*, 319 U. S. 427, 431, 87 L. Ed. 1492 (1942) and *Stroble* v. *California*, 343 U. S. 181, 96 L. Ed. 872 (1951).

This Court has not hesitated to deny relief of the nature sought in the instant case where the petitioner has failed

to sustain his burden of showing essential unfairness, even to the extent of denying relief where there was conflicting evidence. In the case of *Lisenba* v. *California*, 314 U. S. 219, 86 L. Ed. 166 (1941), the petitioner contended, among other things, that his conviction was in violation of the Fourteenth Amendment in that the testimony of a co-defendant against him was obtained by fraud, was known by the prosecution to be false, and, hence, the trial at which he was convicted was a mere pretense. The petitioner in that case obtained affidavits from the co-defendant who had testified against him and used the same in the course of petitioning for a rehearing of his appeal before the California Supreme Court. As in the instant case, the State Court denied the petition for rehearing, and petitioner appealed to this Court. Under those circumstances, this Court (314 U. S. at page 227) said:

> "* * * and a comparison of the testimony at the trial with the allegations of the affidavits raises serious doubts as to their truthfulness. The appraisal of the conflicting evidence was for the Court below. Even if its refusal to believe Hope's depositions were erroneous, the error would be no more a denial of due process than was its approval, on appeal, of the trial judge's refusal to direct a verdict on the ground of insufficiency of evidence".

There is a striking similarity between the instant case and the situation which this Court considered in the case of *Buchalter* v. *New York*, *supra*. The defendant in that case asserted that the prosecution had denied him due process under the Fourteenth Amendment by suppressing evidence. This Court (at 319 U. S. 431) said:

> "The point as to the alleged suppression of evidence is without merit. Certain documentary evidence was in court. The Judge ruled that the prosecuting officer need not submit it to defense counsel for examination. If there was error in the ruling it was error of the Court. Upon motion for rehearing, the Court of Appeals examined the papers and found that they were not of significance in respect of any issue in the case. No such showing of suppression of evidence or connivance at perjury, as has heretofore been held to require corrective process on the part of the State, was shown."

As in the instant case, there was an examination in the Buchalter case by an appellate court of the State of certain documentary material, which was found not to be of any significance. In the instant case, the documentary material was appraised by the Supreme Court of New Jersey as "without persuasive significance" (Opinion, Supreme Court of New Jersey, Petitioner's Appendix A, p. 28). Where the evidence fails to establish any suppression of evidence favorable to the defendant it has been held that he was not denied his guaranties under *Pyle* v. *Kansas, supra*. *White Thunder* v. *Hunter*, 149 F. 2d 578 (C. C. A. 10th 1945), cert. den. 325 U. S. 889, 89 L. Ed. 2002; *Soulia* v. *O'Brien*, (D. C. Mass. 1950) 94 F. Supp. 764, aff'd (C. A. 1st) 188 F. 2d 233, cert. den. 341 U. S. 928, 95 L. Ed. 1359, reh. den. 341 U. S. 957, 95 L. Ed. 1378.

Conclusion.

It is respectfully submitted that the petitioner in the instant case utterly fails to show any essential unfairness—and, certainly, no essential unfairness approaching the

status of a demonstrable reality—as required by the decisions of this Court (*Adams* v. *United States, supra; Buchalter* v. *New York, supra;* and *Stroble* v. *California, supra*), and his petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

H. Russell Morss, Jr.,
County Prosecutor, and
Chester A. Weidenburner,
First Assistant Prosecutor,
Attorneys for Respondent.

Hyman Isaac,
Special Assistant Counsel,
Of Counsel for Respondent.